(C) Judicial Decisions

For the second year in a row, there were no judicial decisions at the EU level against the Portuguese Republic for infringements of the EU acquis. Such a positive situation results from proactive action by the Portuguese authorities in implementing EU directives. Better cooperation with the European Commission and an early warning system for possible infringements also played an important role in reducing environmental litigation at the EU level.

(4) NATIONAL LEGISLATION OF INTERNATIONAL SIGNIFICANCE

Resolution of the Council of Ministers 5/2021 of 19 January established a pilot program for *ex ante* legislative climate impact assessment. Regulation 38/2021 of 16 February sets a carbon tax (€2 per passenger per trip) for air and maritime travel. Decree-Law 69/2021 of 30 July prohibits the placement in the market of cosmetics and detergents containing plastic microspheres.

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E. Switzerland

(1) PARIS AGREEMENT AS A CATALYST FOR SWISS ENVIRONMENTAL LAW AND POLICY

Switzerland's domestic greenhouse gas (GHG) emissions stood relatively low at 5.5 tonnes of carbon dioxide equivalents per capita in 2019. However, by adding all consumption-based emissions caused on both Swiss territory and abroad, including imported goods and international air travel, Switzerland's GHG footprint amounted to fourteen tonnes of carbon dioxide equivalents per capita and year. This rate is two-and-a-half times higher than the global average of six tonnes of carbon dioxide equivalents. Although it was the first country to communicate its Nationally Determined Contribution (NDC) under the Paris Agreement—entering into force for Switzerland on 5 November 2017 and pledging to reduce its greenhouse gas emissions by 50 percent by 2030 compared to 1990 levels—Switzerland likely missed its reduction goals pledged for 2020 under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) and the Doha Amendment.

The Paris Agreement has operated as a catalyst for Swiss environmental law and policy. The treaty gave rise not only to the revision of the Federal Act on the Reduction of Carbon Dioxide Emissions but also to the conclusion of various bilateral agreements on transferring mitigation outcomes. These agreements rest on Article 6(2) of the Paris Agreement. The cooperation agreement, concluded with the Republic of Peru on 20 October 2020, represents the first such agreement worldwide (see section 3 below). The association KlimaSeniorinnen—a compound of the words *Klima* (German for 'climate') and *Seniorinnen*

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(German for 'senior female citizens')—rested part of its lawsuit against the Swiss Federal Executive under the tenet of 'climate change litigation' on the Paris Agreement (see section 4 of this report). The treaty further constitutes the driving force behind the Glacier Initiative, a popular initiative supported by more than 113,000 Swiss citizens seeking to amend the Swiss Federal Constitution with a clause laying out a binding road map to 'net zero' by 2050 (see section 5 of this report).

(2) COMPREHENSIVE REVISION OF THE FEDERAL CARBON DIOXIDE ACT VETOED AT THE BALLOT BOX

(A) Federal Carbon Dioxide Act: The Centrepiece of Swiss Domestic Climate Change Law

The Federal Office for the Environment projected in its 2020 Biennial Report under the UNFCCC that Switzerland would only achieve a reduction of 22.6 to 34.7 percent of its GHG emissions by 2030 compared to 1990 levels with the existing or planned measures, well short of the 50 percent set forth in its NDC. This NDC, and the fact that the emission targets outlined in the Federal Carbon Dioxide Act merely cover the period from 1990 to 2020, both gave rise to a comprehensive revision of the statute. The Federal Carbon Dioxide Act originally entered into force on 1 May 2000 and forms the centrepiece of Swiss domestic climate change law (see J. Reich, 'Federalism and Mitigating Climate Change: The Merits of Flexibility, Experimentalism, and Dissonance' (2021) 10 Transnational Environmental Law 263 at 272–4 <https://doi.org/10.1017/S2047102521000121>). Federal Parliament opted to meet its obligations under international climate change law in a single bill, rejecting a sectoral approach in which the provisions for the individual sectors (industry, buildings, and transport) would have been accommodated in different statutes. This design contributes to uniform climate protection legislation and provides for coherent implementation by a single federal administrative agency—the Federal Office for the Environment (at 275, 285, and 291). However, in political terms, such a comprehensive approach may be associated with contingencies as it risks unrelated interest groups forming an 'unholy alliance' opposing the project from different angles. This is especially true with respect to the Swiss Federal Constitution, which allows fifty thousand citizens to launch a referendum against any bill adopted by federal parliament. Roughly half of all federal acts put to such an optional referendum have been vetoed at the ballot box since 1874 (at 269).

(B) Broad Parliamentary Consensus, Narrow Defeat at the Ballot Box

After three years of deliberations, federal parliament adopted a comprehensively revised Federal Carbon Dioxide Act in September 2020, setting reduction targets for the time period until 2030 (see *Federal Gazette* (FF) 2020 7607 <https://www.fedlex.admin.ch/eli/fga/2020/2013/fr>). The referendum bill enjoyed broad parliamentary support and would, among other measures, have cemented the role of the existing carbon dioxide levy as 'the backbone of Swiss climate policy' (see Reich, *ibid* at 273), imposed on the production, extraction, and import of thermal fuels (most notably heating oil, natural gas, and coal). Designed as an incentive tax, approximately two-thirds of the revenue from the carbon dioxide levy are redistributed to both the resident population and the companies residing in Switzerland, independent of consumption (at 274).

An optional referendum was successfully launched against this revised bill, which faced severe and well-funded opposition from various interest groups ranging from the Homeowners' Association, car importers, and oil industry associations to libertarian critics of the bill. Notably, hardly any of the opposing interest groups questioned the need for tackling

the climate crisis as such but took aim at higher costs to be borne by consumers in general and by tenants, air travellers, and motorists in particular, glossing over the fact that the vast amount of the increased carbon dioxide levy would be redistributed. After a fierce campaign, the referendum bill was narrowly defeated, with 51.59 percent of the votes cast on 13 June 2021 rejecting the revised bill.

In the aftermath of the vote, various political science studies sought to determine the motives and causes for the rejection of the revised Federal Carbon Dioxide Act based on voter surveys (see, for example, T. Milic, 'Brachten die Agrarinitiativen das CO_2-Gesetz zu Fall? Der Einfluss von "'ultipack-Abstimmungen"' (2021) 2 LI Focus <https://www.liechtenstein-institut.li/download_file/2065/7309>; L. Golder and others, 'Analyse VOX Juin 2021' (2021) <https://vox.gfsbern.ch/fr/publications/>). They concluded that voters' financial considerations (higher levies on fuel and flight tickets) and popular initiatives voted upon on the same day (exceptionally high mobilization of the rural population) played a pivotal role in the rejection. In addition, parts of the climate strike movement also spoke out against the revised Federal Carbon Dioxide Act as they deemed the measures therein too lenient.

(C) A Questionable New Approach: Who's Paying the Price?

To avoid a regulatory gap, since the overall emission reduction target of 20 percent was set only until 2020, the Federal Parliament extended the target to a further 1.5 percent per year until 2024, as well as all uncontested instruments that were due to expire by the end of 2021—in particular, the reduction commitments of companies and the compensation of fuel importers. As this is only a transitional arrangement, it is vital that the Federal Council find a palatable solution that will be accepted by the Swiss people for the period after 2024. The Federal Council therefore asked the responsible Federal Department to draft a new revision of the Federal Carbon Dioxide Act for the period until 2030, mandating it to take into account the results of the referendum and emphasizing the need for garnering broad support. The consultation proceedings on this newly revised Federal Carbon Dioxide Act were launched in December 2021. The target of a 50 percent reduction of GHG emissions as compared to 1990 levels (as pledged under the Paris Agreement, see section 1 above) remains. The new draft, for the first time, mentions the eventual aim of a net-zero GHG emissions policy.

Learning from the previous areas of political tension, the new bill aims to achieve its goals without introducing any additional levies. Whereas under the current Federal Carbon Dioxide Act, two-thirds of the carbon dioxide levy are redistributed to the population as well as the economy by way of a reduction in health care bills and offsets in pension funds, benefitting those who do not contribute to the levy the most, the new draft temporarily allows for up to 49 percent of the revenue from the carbon dioxide levy to be used for the reduction of carbon dioxide emissions, thereby leaving less to be redistributed to the population. This raises questions of constitutionality since the federation must be specifically empowered by the Federal Constitution to raise taxes, whereas this requirement is lower for causal taxes. Already problematic before, the usage of almost half of the amount of the levy towards measures mitigating carbon dioxide emissions pushes the boundaries of a causal tax (see, for example, R. Wiederkehr, 'Die geplante CO_2-Abgabe ist verfassungsmässig problematisch,' *Neue Zürcher Zeitung* (2022)). The Federal Department of the Environment, Transport, Energy and Communications (DETEC), on the other hand, asserts the constitutionality of its proposal, pointing to the fact that federal parliament deemed it constitutional to use 49 percent of the levy towards measures reducing carbon dioxide emissions (see Federal Department of Environment, Transport, Energy and Communications, 'Révision de la loi sur le CO_2: Rapport explicatif relatif au projet mis en consultation' (2021) at 56 <https://www.newsd.admin.ch/newsd/message/attachments/69701.pdf>).

(3) BILATERAL AGREEMENTS UNDER ARTICLE 6(2) OF THE PARIS AGREEMENT ON THE TRANSFER OF MITIGATION OUTCOMES

(A) Voluntary Cooperation under the Paris Agreement

The successor of Articles 6 and 12 of the Kyoto Protocol under Article 6(2) of the Paris Agreement allows for voluntary bilateral cooperation between states for the transfer of 'mitigation outcomes.' Any party is thus, on the basis of a specific bilateral treaty, entitled to attain its NDC using 'mitigation outcomes'—GHG emission reductions or removals—achieved abroad. Two states may agree that one party (the credit receiver) funds programs (mitigation activities) that result in mitigation outcomes on the territory of the other party (the credit transferor) that will then be counted, as a whole or in part, towards the receiver's NDC. Such reallocated GHG emission reductions or removals are termed internationally transferred mitigation outcomes (ITMOs). This procedure forms part of the scheme that replaced the Clean Development Mechanism and the Joint Implementation system, both of which were set up under the Kyoto Protocol. Serious doubts, however, have been voiced as to whether Clean Development Mechanism projects may both deliver GHG emission reductions and contribute to sustainable development as set forth by the Kyoto Protocol (see, *inter alia,* C. Sutter and J.C. Parreño, 'Does the Current Clean Development Mechanism (CDM) Deliver its Sustainable Development Claim?' (2007) 84(1) Climatic Change 75 at 89). For a long time, the parties to the Paris Agreement have failed to act on these findings and have fallen short of agreeing on a set of rules to ensure the integrity of international carbon markets. This situation was remedied at the twenty-sixth Conference of the Parties (COP-26) to the UNFCCC, which took place in Glasgow in November 2021. On this occasion, the parties finally adopted a 'Guidance on cooperative approaches referred to in Article 6, paragraph 2, of the Paris Agreement.'

The Implementing Agreement to the Paris Agreement between the Swiss Confederation and the Republic of Peru, signed on 20 October 2020, is the first such treaty worldwide concluded under the Paris Agreement. Its preamble reaffirms the parties' commitment to the Paris Agreement and their endorsement of the San Jose Principles, a previous multilateral effort towards a guide on Article 6(2) activities. As the treaty includes safeguards against counting mitigation outcomes twice, the Peru Agreement set a precedent on an issue that was fiercely debated at COP-25 and contributed to its unsuccessful closing.

The ITMO approach is not without its critics. Some allege that such an approach not only gives Switzerland a free pass to continue emitting GHGs domestically but also further distorts its GHG statistics. This is owed to the fact that ITMOs gained abroad count towards Switzerland's NDC, whereas emissions caused abroad by imported goods and international air travel from and to Switzerland do not feature in the country's GHG statistics. Given Switzerland's high rate of consumption-based emissions per capita (see section 1 above), such criticism is not without merit.

(B) Architecture of the Bilateral Agreements on ITMOs

The Peru Agreement's objective, according to Article 2, is 'to establish the legal framework for the transfers of Mitigation Outcomes for use towards achievement of NDC or other mitigation purposes.' Articles 3, 4, and 10 go on to set out standards and requirements for this process. For example, mitigation outcomes must be real, additional to any that would otherwise occur, and permanently achieved, and the activities from which they result must be in line with the concept of sustainable development and respect human rights. Moreover, emissions cannot be counted twice (compare Article 6(2) of the Paris Agreement, regarding 'avoidance of double counting'). Among other safeguards to ensure compliance with the

rules on mitigation activities, monitoring reports and verification thereof must be made available by the parties and all transfers of mitigation outcomes must be authorized by both parties. The parties are required to establish a procedure for entities to submit a request for authorization to the other party (Articles 5 and 6) that can then be approved for the transfer to be made and recognized by the parties (Article 8). In addition, the parties must establish a publicly accessible register, which they must update on an ongoing basis with newly issued permits and other information (Articles 5(4)(9)).

The other bilateral agreements that Switzerland concluded under Article 6(2) of the Paris Agreement with Ghana, Senegal, Vanuatu, Georgia, and Dominica, respectively, closely resemble the Peru Agreement in design and objectives.

(4) MITIGATION-RELATED CLIMATE CHANGE LITIGATION BASED ON HUMAN RIGHTS CLAIMS: THE *KLIMASENIORINNEN* JUDGMENT

The Federal Supreme Court, Switzerland's highest judicial authority, issued its judgment on a motion brought by KlimaSeniorinnen (Senior Women for Climate Protection) on 5 May 2020 (Federal Supreme Court, judgment of 5 May 2020, Case no. 1C_37/2019). The appellants asked various government agencies belonging to the Swiss Federal Executive to take every measure for Switzerland to reach its NDC as well as the overall Paris Agreement target of restricting the increase in global average temperatures to well below two degrees Celsius above pre-industrial levels. Swiss procedural law requires claimants to demonstrate a specific, personal interest to grant a challengeable ruling on a governmental act or omission (judicial review). Claimants therefore had to prove an 'interest worthy of protection,' meaning that they are more severely affected by the alleged governmental omissions than the general public. Against this backdrop, KlimaSeniorinnen argued that they, as elderly women, found themselves at a particular risk posed by climate change due to the higher frequency and severity of heat waves. They pointed to various studies, according to which heat waves lead to significantly higher excess mortality in groups of elderly women when compared to elderly men or the younger population. According to the claimants, the Federal Executive failed to meet its duty to protect based on Articles 2 and 8 of the European Convention on Human Rights (ECHR) and similar fundamental rights enshrined in the Swiss Federal Constitution by failing to bring forward more stringent climate mitigation legislation. The court proceedings initiated by KlimaSeniorinnen thus form part of the category of mitigation-related climate change litigation against governments based on human rights-claims to advance specific emission reduction policies.

The Federal Supreme Court rejected the appeal, holding that there remained adequate time for the Federal Executive to meet its commitments under the Paris Agreement, that the appellants' rights were not sufficiently affected, and that their appeal consequently did not serve an individual legal interest but amounted to an *actio popularis* instead.

The KlimaSeniorinnen have taken their case to Strasbourg, lodging their complaint with the European Court of Human Rights (ECtHR) on 26 November 2020 (ECtHR, Appl. no. 53600/20). The ECtHR communicated the case to the Swiss federal government in March 2021 and gave it priority status, asking for a response by July. The Swiss government gave its comments on the case on 16 July.

Shortly before, the ECtHR had communicated its first climate change case, *Duarte Agostinho and Others v Portugal and Others* (ECtHR, Appl. no. 39371/20), to the respective respondent states. Therein, six Portuguese youths and children, *inter alia*, claim a violation of Article 14 of the ECHR, in conjunction with Articles 2 and/or 8 of the ECHR. Under this heading, the claimants argue that their generation is, and will be in the future, more acutely

affected by the effects of climate change than previous generations, and the interference with their rights therefore more severe. While KlimaSeniorinnen founded its claim on the old age of its members, the Portuguese youths thus took a similar approach, but conversely based their argument on their young age.

(5) DIRECT DEMOCRACY AND THE POWER OF POPULAR INITIATIVES: GLACIER INITIATIVE

The Federal Supreme Court, in its *KlimaSeniorinnen* judgment, advised the appellants that their 'concerns are not to be enforced by having recourse to the courts, but by political means, wherefore the Swiss system with its instruments of direct democracy opens up plenty of possibilities' (translated by the authors). Less than half a year before this judgment was issued, the initiative committee of the so-called Glacier Initiative had filed 113,125 valid signatures in support of their cause with the Swiss Federal Chancellery. The initiative rests on two main pillars: first, should Switzerland continue to emit human-induced GHGs, their effect on the climate must be permanently offset by carbon sinks from 2050 at the latest and, second, from 2050 onwards, no fossil fuels may be brought into circulation, except for applications that are technically non-substitutable, and only as far as the resulting effects on the climate are permanently offset by carbon sinks (FF 2019 3075 <https://www.fedlex.admin.ch/eli/fga/2019/1004/fr>).

The Federal Council published its own direct counterproposal to the Glacier Initiative, embracing the net-zero GHG emission policy from 2050 onward but opting against a total ban on fossil fuels. Ultimately, the initiative will be decided upon at the ballot box, unless the committee withdraws its initiative in favour of the counterproposal.

(6) CONCLUSION

The developments in Swiss environmental law and policy throughout 2020 and 2021 demonstrate that different approaches to achieving more stringent climate change mitigation policies for meeting Switzerland's commitments under international law exist. Aside from the ordinary legislative process, recently unsuccessfully attempted with respect to the revision of the Federal Carbon Dioxide Act, individuals may choose the avenue of strategic litigation, as pursued by the KlimaSeniorinnen, or opt for the tools of direct democracy and launch a popular initiative. This was the path chosen by the committee behind the Glacier Initiative. Which one of those approaches is the most promising cannot be determined at this stage. One thing, however, remains certain: climate change, as one of the most pressing problems facing modern civilization today, requires a multi-pronged approach spanning from litigation against public and private entities to legislation and civic engagement.

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